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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-626

HEFTEL BROADCASTING HONOLULU, INC.,
Petitioner,

v.

GORDON Y. H. WONG,
DIRECTOR of TAXATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Hawaii, not yet reported, appears in Appendix B of the Petition. The opinion of the Tax Appeal Court of the State of Hawaii, which is not a reported case, appears in Appendix A of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Hawaii Supreme Court's decision of instate activity was based solely on passive contract rights as the Petition claims or on presence of the films, rental instate, performance of intangible rights instate (telecasting) and actual transfer of possession instate.

2. Whether the imposition of the Hawaii gross receipts tax on instate activities of a nonresident corporation is contrary to the due process clause of the United States Constitution.

3. Whether imposition of the Hawaii gross receipts tax on said nonresident corporation is a tax on interstate commerce in violation of the commerce clause of the United States Constitution.

4. Whether the imposition of the Hawaii gross receipts tax on said nonresident places multiple burdens in contravention of said commerce clause.

STATUTES INVOLVED

§237-13 *Imposition of tax.* There is hereby levied and shall be assessed and collected annually privilege taxes against persons on account of their business and other activities in the State measured by the application of rates against values of products, gross proceeds of sales, or gross income, whichever is specified, as follows:

* * *

(10) Tax on other business. Upon every person engaging or continuing within the State in any business, trade, activity, occupation, or calling not included in the preceding paragraphs or any other provisions of this chapter, there is likewise hereby levied and shall be assessed and collected, a tax equal to four per cent of the gross income thereof. In addition, the rate prescribed by this paragraph shall apply to a business taxable under one or more of the preceding paragraphs or other provisions of this chapter, as to any gross income thereof not taxed thereunder as gross income or gross proceeds of sales or by taxing an equivalent value of products, unless specifically exempted.

§237-2 "Business," "engaging" in business, defined. "Business" as used in this chapter, includes all activities (personal, professional, or corporate), engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, but does not include casual sales.

The term "engaging" as used in this chapter with reference to engaging or continuing in business also includes the exercise of corporate or franchise powers.

STATEMENT OF THE CASE

The petition seeks to review the judgment of the Supreme Court of the State of Hawaii, dated and entered on August 17, 1976, affirming the decision of the Tax Appeal Court in favor of the Respondent, Director of Taxation, State of Hawaii.

The Director of Taxation assessed CBS Enterprises, Inc. gross receipts taxes, penalties, and interest in the amount of $4,290.37 for the period beginning January 1, 1970, and ending September 30, 1973, on receipts realized from rental of films to the predecessor of Heftel Broadcasting Honolulu, Inc. (KGMB-TV), who is obligated under the film license agreement of its predecessor to pay Hawaii taxes imposed upon CBS, has paid said amount under protest, and brings this action for refund of said amount.

The Tax Appeal Court held that CBS is engaged in the business of renting films in the State of Hawaii and is liable for the Hawaii gross receipts tax upon its rental income. The Tax Appeal Court found that the presence of CBS' films in Hawaii and their rental constituted sufficient local contact for the imposition of the tax. The court stated that the transferring of possession of the films and rental thereof for use are taxable activities which occurred in Hawaii after completion of the interstate journey.

The Hawaii Supreme Court agreed with the argument of the Director of Taxation that the presence and rental of CBS' films in Hawaii constituted "economic activity" in the state to sustain the tax. Petition, Appendix B.4.

The Hawaii Supreme Court went one step further and found additional instate activity in the intangible telecast rights, because these rights were performable only in Hawaii.

ARGUMENT

I. CBS Is Doing Business Instate.

The taxing statute of the State of Hawaii imposes a privilege tax on all persons on account of their business and other activities in the state. It is a tax on the privilege of doing business in the state. §237-13, Hawaii Revised Statutes.

It is significant that the tax is imposed on all "other business" in addition to those enumerated in the statute. §237-13(10), Hawaii Revised Statutes. All business instate, whether consisting of sales or services, are taxable.

The measure of the tax is gross income, which includes all receipts and income of the business or businesses engaged in, including rentals. §237-3, Hawaii Revised Statutes.

The legislature has defined "business" to mean "all activities . . . engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect . . . . " §237-2, Hawaii Revised Statutes.

The argument of the Petitioner that the state supreme court found nexus solely on the basis of passive and intangible contract rights is without basis. The Hawaii Supreme Court held that "the presence and rental of CBS' films in Hawaii constituted 'economic activity' sufficient to meet the 'instate business activity' requirement of the statute." Petition, Appendix B.4.

The opinion of the court stated that CBS leased not only the film prints but also the intangible telecast rights of the films to KGMB-TV. Petition, Appendix B.5.

The Hawaii Supreme Court recognized that these telecast rights were consummable only in Hawaii. Performance of the telecasting rights would occur almost entirely in Hawaii. The telecast occurs in Hawaii and the viewers are in Hawaii. CBS exercises dominion over the films in Hawaii as owner-lessor. The activities involved are all intrastate. The Hawaii Supreme Court held there was greater instate activity than claimed by the Director of Taxation.

Radio broadcasting, which reached Hawaii audience predominantly, was sufficient activity instate to sustain the tax. *McCaw & Keating v. Tax Commissioner, Fase*, 40 Hawaii 121 (1953), affd. 216 F.2d 700, cert. den. 348 U.S. 927 (1955). The

United States Circuit Court of Appeals agreed with the Hawaii Supreme Court notwithstanding the taxpayer's argument that radio broadcasting constituted interstate commerce.

Profits realized from the sale of a membership in the New York Stock Exchange by a nonresident were subject to taxation by the State of New York notwithstanding the argument that the membership was intangible personal property. *New York ex rel. Whitney v. Graves*, 299 U.S. 366 (1937). The rationale was that the privilege which inheres in the exchange membership is the right to conduct transactions at that market place and its very nature localizes it at the exchange. "It is a privilege which can be exercised nowhere else." *Stone v. Stapling Machine Co.*, 220 Miss. 470, 71 So.2d 205 (1954), appl. dism. (1954), 348 U.S. 802, reh. den. 348 U.S. 884; *Curry v. McCanless*, 307 U.S. 357 (1939).

The nature and incident of the right to telecast is localized by virtue of the right to use the films. The privilege and right to use the films in Hawaii is the dominant feature of the right to telecast. The right to use links it to the situs of the films and brings it within the taxing power of the state.

The case of *Provident Savings Life Assurance Society v. Kentucky*, 239 U.S. 103 (1915), is distinguishable. There the court held that a state may not tax premiums received under existing contracts by a company who is no longer doing business in the state.

Involved in *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), were sales of a Delaware retail store to its customers in Delaware and a Maryland statute requiring the Delaware store to collect a tax from Maryland residents. The Delaware store had no property or receipt of income in Maryland. Significantly, this Court recognized in *Miller Brothers Co. v. Maryland, supra*, that, if the state has jurisdiction of the nonresident's property or transactions, it may reach the nonresident.

The case of *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1937), is distinguishable, because the California tax was on reinsurance contracts, which were made out-of-state and had no connection with California, except the initial insurance contracts, which were not directly involved in the reinsurance.

The case of *James v. United Artists Corp.*, 305 U.S. 410

(1939), is distinguishable. The case involved a narrow taxing statute on persons engaged within the state in collecting income from use of property. The court found that the taxpayer did not engage in the activity of collecting income within the state. The statute taxed gross receipts only on that activity.

Filmakers Releasing Organization v. Realart Pictures, 374 S.W.2d 535 (1964), does not involve state taxation and is therefore distinguishable.

II. The State Has Jurisdiction To Levy A Tax On Activity Instate.

A tax on income arising from activities instate meets the requirements of Due Process. These activities form a sufficient nexus. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940).

A state may tax property whether owned or leased, located within its boundaries though transported into the state provided interstate commerce has ceased. *Stone v. Stapling Machine Co., supra.*

See also *Boswell v. Paramount Television Sales, Inc.*, 291 Ala. 490, 282 So.2d 892 (1973); *Besser Co. v. Bureau of Revenue*, 74 N.M. 377, 394 P.2d 141 (1964).

Intangibles such as telecast rights involved here can be taxed by states other than the domicile of the owner where there have been sufficient contacts to make it fair and reasonable that the tax be paid. *Fidelity and Columbia Trust Co. v. Louisville*, 245 U.S. 54 (1917); *Curry v. McCanless*, supra; *New York ex rel. Whitney v. Graves*, supra; *Stone v. Stapling Machine Co.*, supra; *McCaw & Keating v. Tax Commissioner, Fase*, supra.

The case of *National Bellas Hess, Inc. v. Illinois*, 386 U.S. 753 (1967), is inapplicable. Involved there were sales consummated out of state. The case here involves property located instate and which are used instate to generate income for the owner of the films.

Scripto v. Carson, 362 U.S. 207 (1960), does not support Petitioner's argument. The case involved the Florida use tax which a foreign corporation was required to collect from its Florida customers. It should be noted that the United States Supreme Court found there was sufficient nexus and upheld the

collection of the tax.

Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954), cited is also inapplicable. The taxing statute was held invalid there, because it sought to tax all the income earned in the interstate business without apportionment. Clearly in the present case, the rentals are all derived instate and apportionment is not necessary. It should be noted that the Virginia statute in the above case was subsequently amended and the United States Supreme Court in *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1959), upheld the tax against the foreign corporation doing an exclusively interstate business in Virginia.

Spector Motor Service Inc. v. O'Connor, 340 U.S. 602 (1951), is also inapplicable. The taxpayer there was engaged exclusively in interstate commerce, and the tax involved was on the franchise to do interstate business. In addition, the holding of *Spector* has been narrowed by the later decision in *Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

III. The Tax Is Not A Tax On Interstate Commerce.

Congress has not pre-empted the field of state taxation of television films or telecasting of television films.

The case of *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923), is not applicable because an Act of Congress to prevent combinations and conspiracies on interstate commerce was involved.

An exhibitor of motion picture films brought an action against distributors of the film alleging that the distributors controlled distribution of all films and that all the distributors combined and conspired in restraint of trade and commerce among the several states.

There is no analogy between the power to tax and the power of regulating commerce. In *Gibbons v. Ogden*, 9 Wheaton 1, pp. 197, 198, the court said:

> "The grant of power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under considera-

tion. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the states, are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities, at the same time. * * * When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

Paramount Pictures Distributing Co., Inc. et al. v. Henneford et al., 184 Wash. 376, 51 P.2d 385 (1935), is not applicable. It was based on the authority of the *Binderup* case, *supra*, which was based upon the Sherman Anti-Trust Act passed by Congress to restrain conspiracies in commerce between the states. In addition, the tax involved in *Paramount Pictures Distributing Co. Inc. et al v. Henneford, supra*, was on all gross receipts of the local film exchange in Seattle including receipts of exhibitors outside of Seattle. The court in the *Henneford* case recognized that "a tax . . . measured by a percentage of the entire business transacted, is a regulation of foreign commerce and void." The tax in our case is only on local intrastate commerce and not measured by out-of-state business transacted.

The case of *State v. Paramount Publix Corp.*, 178 La. 818, 152 So. 534 (1934), cited by Petitioner, is also based on the decision in *Binderup, supra*, and is also inapplicable.

The case of *West Publishing Co. v. McColgan*, 328 U.S. 823 (1946) affirming 27 Cal.2d 705, 166 P.2d 861 (1946), is cited by Petitioner as requiring substantial localized activities to sustain the tax. It should be noted that this case has been largely superseded by *Portland Cement Co. v. Minnesota, supra*.

IV. The Tax Is Allocated To Intrastate Sources; It Does Not Impose Multiple Burdens On Interstate Commerce.

The income subjected to the tax is not discriminatory; the tax is on local activities within the state forming sufficient nexus to support the tax. See *Portland Cement Co. v. Minnesota, supra*, wherein the court stated at page 463:

> "There is nothing to show that multiple taxation is present. We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do."

It should be noted that the income earned from the use of the film is from sources in Hawaii. This income earned in Hawaii cannot again be taxed elsewhere. The tax is not one which can be repeated by other states as to lay an added burden to the interstate movement of the films. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938).

CONCLUSION

For the reasons stated above, Respondent respectfully requests that a Petition for a Writ of Certiorari should be denied.

Dated: Honolulu, Hawaii, December 29, 1976.

Respectfully submitted,

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I hereby certify that a copy of this Brief In Opposition was served upon George G. Grubb, Attorney for Petitioner, by mailing the same to him at his office at 22nd Floor, Pacific Trade Center, 190 South King Street, Honolulu, Hawaii 96813 this date.

Honolulu, Hawaii, December 29, 1976.

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